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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Rules and Regulations Implementing the
 Telephone Consumer Protection Act of 1991)

CC Docket No. 02-278
 CC Docket No. 92-90

**INITIAL COMMENTS OF THE
 NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits this response to the Notice of Proposed Rulemaking ("*Notice*") issued by the Federal Communications Commission ("Commission" or "FCC") in the above-captioned proceedings.¹ Among other things, if the FCC does determine to establish a nationwide do-not-call list in conjunction with the Federal Trade Commission's ("FTC") proposal, the *Notice* seeks comment requests comment on the potential relationship of that database to State Do-Not-Call laws including specifically whether those States that have adopted Do-Not-Call laws should administer those laws only to the extent that they apply to intrastate telemarketing calls. (*Notice* at ¶ 61- 63)

Last February, NARUC passed a resolution addressing the related Federal Trade Commission's rulemaking. The positions outlined in that resolution are applicable in this proceeding. It advocates strengthened protections against unwanted telemarketing activity, including establishment of a national "do-not-call" registry, but also respectfully requests that no action be taken concerning the establishment of a national "do-not-call" registry that would diminish, harm or place additional financial burdens upon the existing State "do-not-call" registries.

In support of those positions, NARUC states as follows:

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 02-278, 92-90. (FCC 02-250) Notice of Proposed Rulemaking and Memorandum Opinion and Order (rel. Sept. 18, 2002). 67 Federal Register 62667 (October 8, 2002) ("*Notice*").

I. NARUC'S INTEREST

NARUC is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications common carriers within their respective borders. Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.'

NARUC's member commissions regulate intrastate telecommunications services. These commissions are obligated to ensure that local telephone service supplied by carriers is provided at just and reasonable rates. Some of NARUC's members directly administer "do-not-call" lists for their State. Others are responsible for the related State auto-dialer rules referenced in the FCC *Notice*.

II. DISCUSSION

NARUC is pleased that the FCC is seeking comment on "...how we could work together with States that have [already] adopted do-not-call lists." Notice at ¶ 54. The proposed rulemaking seeks comment on the issue of preemption. There are a number of possible scenarios, including sharing of State and FCC/FTC "do-not-call" databases.

NARUC, via its resolution, supports efforts to strengthen telemarketing sales rules. We respectfully suggest that the continuation of existing State programs is in the public interest. Today at least thirty-two States have "do-not-call" lists and more are actively considering legislation.

See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. Cf., 47 C.S.C. § 254 (1996). See also *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

Our resolution both supports increased protections against unwanted telemarketing activity, including establishment of a national "do-not-call" registry, and also respectfully requests that no action be taken by the FTC concerning the establishment of a national "do-not-call" registry that would diminish, harm or place additional financial burdens upon the existing State "do-not-call" registries.

Dual Lists Enhances Deterrence and Leverages the Enforcement Staff of the FTC and the States.

Dual State and FTC/FCC regulations can only build on the successful joint enforcement efforts that both the FTC and the FCC have experienced to date. In the FTC's proposed rulemaking, that agency expressly referenced the benefits of leveraged enforcement: "[The] Act's enforcement scheme allows States to work together, and with the Commission, to jointly sue fraudulent telemarketers in a single action. (footnote omitted) The Commission's own experience confirms that the dual enforcement provision of the Act has been integral in attacking telemarketing fraud. Working together with States in "sweeps" targeted at specific types of telemarketing scams ..." has been very effective. The FCC's notice suggests similar benefits in its discussion of the FCC successful implementation of a joint FCC-State enforcement scheme. *Notice* at ¶ 62.

As the FCC is aware, generally States are well positioned to receive and act on complaints because they are close to the consumers and familiar with carrier trends in their region. Several places in both the related FTC proposed rulemaking, and this notice, cite anecdotal evidence of the extreme consumer interest and participation in current State programs. The FCC expresses belief in ¶ 62 that "... many states have obtained valuable experience and insight into the administration of the do-not-call lists in their respective states."

Both agencies' comments, and an examination of State enforcement activity to date,³ suggest that (1) State enforcement activities have had some impact on complaint levels, and (2) both the FTC and the FCC do not have the staff or resources to replace enforcement efforts of the State agencies. Given the rise of State lists and the concomitant likelihood of increased State enforcement activity, one easy way to decrease telemarketing complaints is for the FCC to assure its rules in no way hinder States' ability to enforce its own and the federal rules.

NARUC also respectfully suggests that the FCC can best leverage the deterrence of federal and State enforcement activity **by** imposing the federal "minimum" standards and allowing additional State requirements - and the associated enforcement actions and fines, to proceed against offending telemarketers.⁴

³ Last year, Connecticut already had almost half of its households on a "do-not-call" list. DM News (June 4, 2001). More than 332,000 phone lines were on Missouri's "do-not-call" list within a short time of its passage. St. Louis Post Dispatch, p. 8 (April 9, 2001). New York reports more than 1 million households had signed up for its "do-not-call" list by the time it took effect on April 1, 2001. Overall, although active enforcement of the existing state DNC laws was not prevalent as the legislative groundswell began in 2000, it increased substantially in the 2001-2 as state prosecutors in various jurisdictions took almost 200 enforcement actions against telemarketers for violations of individual state DNC list laws, with fines ranging from \$1,000 to \$25,000 per illegal call. Enforcement authorities in the individual states listed below have collected over \$1.3 million in reported fines alone. In addition to the levying of monetary penalties, a common characteristic among state prosecutors concerns the public disclosure of DNC enforcement activity. In almost every instance that state legal action has been taken or investigation is being pursued, DNC list authorities have publicly reported on the status of their efforts and the identities of companies involved. In most cases the relevant information is posted on the state website following the issuance of a media release and formal press event. In Missouri, the state Attorney General has thus far collected \$580,000 from 70 different telemarketing companies since enforcement began in that state on July 1, 2001 (as of May 22, 2002). That Attorney General has recently renewed his call for the state legislature to close existing exemptions in the law. In *Oregon*, the Department of Justice has filed more than 119 court actions since the DNC program started, resulting in \$450,000 in penalties, in some cases more than once from the same company. In *New York*, although 13 enforcement actions have been taken against companies for DNC violations, resulting in the assessment of \$218,000 in fines, several hundred notices of potential liability have been issued to companies currently under investigation for over 1,000 recorded consumer complaints. *Indiana* is another state actively enforcing the state law and collecting money from fines levied against telemarketers, while also seeking to tighten existing loopholes through additional legislation. Thus far, the state has settled with 26 different companies and fined them a total of \$80,000. Legislation eliminating existing exemptions for realtors and insurers was considered during the most recent legislative session. It will be reintroduced in 2003. *Tennessee* has collected \$61,000 in settlements against companies engaged in telemarketing since becoming the 13th state to pass a state DNC list law. The total came from 11 separate settlements worked out with companies violating the statute late last year.

Kentucky removed over twenty industry exemptions from their DNC statute in March 2002 when they enacted legislation establishing the country's first "zero call" law in March. Indiana, Missouri, Idaho, and New York all attempted to tighten their statutes by introducing legislation to remove existing DNC exemptions.

A bad actor's exposure to a range of fines and enforcement authority is significantly enhanced by allowing the State lists to remain intact, which, in turn, helps take the profit from those that avoid List obligations while providing the maximum relief for consumers. States currently have been allowed to enforce their lists against any telemarketers. There is no cogent policy reason for the FCC to attempt to alter that enforcement authority.

Dual Lists, in Tandem with Cooperative FTC-State Promotional Efforts, is Likely to Increase Consumer Awareness of; and Participation in both the National FTC List and the State List. It also actually makes it Less Likely Either List Will Contain Incorrect Data on a Particular Consumer.

Moreover, if the States, the FTC, and the FCC can work towards some sort of accommodation on State and FCC/FTC sign-up and promotional programs and sharing of their respective "lists" content, this will undoubtedly result in increased participation in both lists and likely reduce consumer confusion for those that have already signed up for a State list – whether "free" or for a fee. Moreover, such information sharing makes it less likely either list will contain incorrect information about a particular consumer.

Setting a Federal minimum while retaining State lists with similar or enhanced protections, that may include remedies not available under the FCC or FTC's rules, has the added benefit of allowing States to reap some benefit from the effort and resources invested in their respective State programs thus assuring the most efficient use of the already expended State resources.

CONCLUSION

NARUC looks forward to continuing discussion with the FCC on how best to assure that consumers have realistic access to the full panoply of relief options available under both State and federal law. Through such cooperation both federal and State jurisdictions can improve the over-all effectiveness and efficiency in resolving complaints nation-wide.

We request that the FCC take no action that effectively undermines the enforcement efforts of State lists.

Respectfully Submitted,



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November 22, 2002

Resolution Concerning the FTC Notice of Proposed Rulemaking to Amend the Telemarketing Sales Rule, 16 CFR PART 310

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) recognizes the Federal Trade Commission's (FTC) desire and interest to amend the Telemarketing Sales Rule, 16 CFR Part 310, and requests public comment by March 29, 2002 on the proposed changes; and

WHEREAS, The FTC's stated objective in the proposed rulemaking is to prohibit specific deceptive and abusive telemarketing acts and practices and to establish a national "do not call" registry for a two year trial period; and

WHEREAS, NARUC recognizes that despite the success of the existing Rule in correcting many of the abuses and bad practices in the telemarketing industry, complaints about abusive telemarketing practices continue to be filed with the offices of consumer groups, law enforcement agencies and State utility commissions in large numbers; and

WHEREAS, The escalating number of consumers upset with receiving unwanted telephone solicitations is further exemplified by the phenomenal growth in the Direct Marketing Association's ("DMA") list, which has grown to 4 million, increasing by 1 million since June 2000; and

WHEREAS, Consumers' continued frustration over receiving unwanted telephone solicitations at home have prompted twenty (20) States to pass "do-not-call" statutes as of January, 2002, and numerous other States are considering enacting similar laws that would create State-run "do-not-call" registries; and

WHEREAS, States that have enacted "do not call" legislation have gone to great financial expense in the implementation, operation and enforcement of their respective programs; and

WHEREAS, The FTC has requested comments as to whether its proposed rules should pre-empt State "do not call" statutes to the extent that the national "do not call" registry would provide more protection to consumers; *now therefore he if*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its February 2002 Winter Meetings in Washington, D.C, urges all State Commissions to file comments on the FTC's notice of rulemaking; *and he it further*

RESOLVED, That the NARUC General Counsel shall file comments with the FTC on behalf of NARUC in conformance with this Resolution; *and he it further*

RESOLVED, NARUC urges the FTC to strengthen protections against unwanted telemarketing activity, including establishment of a national "do not call" registry, so long as these protections serve as nationwide minimum standards which do not preempt State regulations which provide greater protection to consumers and that the national registry incorporates existing "do not call" lists; *and he it further*

RESOLVED, That NARUC respectfully requests that no action be taken by the FTC Concerning the establishment of a national "do-not-call" registry that would diminish, ham or place additional financial burdens upon the existing State "do not call" registries.

Sponsored by the Consumer Affairs Committee

Adopted by the NARUC Board of Directors on February 13, 2002